

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of LAWRENCE PAUL DOSS.

JUDITH YOUNG-DOSS,

Petitioner-Appellant,

v

LAWRY NICOLE DOSS,

Respondent-Appellee.

UNPUBLISHED
February 11, 2014

No. 303322
Wayne Probate Court
LC No. 01-642445-DE

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Petitioner, Judith Young-Doss, appeals as of right the probate court's judgment requiring petitioner to reimburse the estate of her deceased husband, Lawrence Paul Doss, \$5,496,005. We affirm in part and reverse and remand in part.

This appeal arises from a lengthy and contentious probate proceeding following the death of Lawrence P. Doss (hereinafter "the decedent") on October 28, 2001. At the time of his death, the decedent was survived by his current wife, Judith Young-Doss, and two adult daughters from an earlier marriage, Paula Doss and Lawry Nicole Doss. Paula Doss was not a participant in the lower court proceedings, having accepted \$100,000 in lieu of her interest in the estate.

Petitioner was appointed personal representative to proceed with the informal probate of the estate in November of 2001, with respondent's approval. An inventory was filed with the court on May 28, 2003, listing estate asset interests of \$965,164. Petitioner closed the unsupervised administration of the estate in June 2003, but sought to reopen the estate in December 2003, indicating "the inventory needs to be revised." Petitioner was denoted the successor personal representative of the estate, and thereafter indicated that the estate needed to be reopened in order to transfer the title to various assets belonging to the decedent into the estate.

Disputes arose between petitioner and respondent regarding petitioner's alleged wrongful use of estate assets to pay personal expenses and the failure to remit accurate accountings and inventories of estate property. Petitioner was removed as the personal representative and

respondent was appointed as the second successor personal representative of the estate on March 9, 2006. The dispute was particularly contentious, necessitating numerous court hearings encompassing detailed reviews of estate assets and expenses and seeking to distinguish the estate's assets from the personal liabilities of petitioner and culminating in a lengthy bench trial. Following 13 days of trial, the court concluded that petitioner acted willfully, maliciously and with the intent to defraud the other heirs of the Estate. The court therefore disallowed \$3,016,775 in expenses set forth by petitioner in her accountings. In addition, the probate court found \$17,965 in disbursements from the estate accounts were not properly disclosed on petitioner's accountings and comprised her personal expenses, necessitating petitioner's repayment of this amount to the estate.

On appeal, petitioner specifically challenges the probate court's ruling requiring petitioner to reimburse the estate: (a) \$1,017,210 for mortgage payments made with estate funds on two residential properties owned solely by petitioner, (b) \$591,253 representing the value of estate business interests not liquidated by petitioner when acting as personal representative of the estate, (c) \$558,825 in attorney fees incurred on behalf of the estate by respondent, Lawry Nicole Doss, as the second successor personal representative, (d) \$230,000 in excess capital gains taxes incurred due to miscalculation following redemption of the estate's business interest in Atwater Entertainment Associates, L.L.C., and (e) \$887,686 imposed as a surcharge against petitioner. We shall address each challenge in turn.

Petitioner challenges the probate court's decision to disallow expenses she reported for payment of pre-existing mortgage debts on the marital home (Suffolk property) and a property in Martha's Vineyard. Petitioner asserts that although the two properties are owned by her alone and are not assets of the estate, the associated mortgages on the properties were incurred by and also affirmatively approved by the decedent before his death, making them liabilities of his estate.

"We review a probate court's factual findings under the clearly-erroneous standard." *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.* (quotation marks and citation omitted). "We review de novo issues of statutory interpretation." *Id.*

According to the evidence adduced, the Martha's Vineyard property belonged to petitioner before her marriage, without encumbrances. During her marriage to the decedent, however, she and decedent obtained at least two mortgages on the property, with the mortgages taken out in both petitioner and decedent's names. At the time of the decedent's death in October 2001, debt remained outstanding on the Martha's Vineyard property mortgage in the amount of approximately \$81,000. Petitioner acknowledged using estate funds to pay off some of the mortgage.

The Suffolk property is the marital home, purchased during petitioner and the decedent's marriage, and which comprised a joint debt of the decedent and petitioner. During the marriage, he and petitioner had acquired several mortgages on this property, totaling \$898,000, and petitioner acknowledged using estate funds to pay on the mortgages for this property after decedent's death. At the time of the decedent's death, it appears that over \$770,000 of debt still

existed for the Suffolk property. While the personal representative of the estate, petitioner refinanced these mortgages, partially paying off and consolidating them into one loan of \$625,000 in her name only.

While acting as the estate's personal representative, petitioner listed mortgage and/or equity line payments from the estate for the Suffolk and Martha's Vineyard properties on her annual accountings, which the probate court disallowed in their entirety. Petitioner does not assert error with the probate court's disallowance of costs associated with the payment of maintenance, utilities and taxes for these properties and does not deny her personal liability for a portion of the mortgage payments. Petitioner does, however, contend that her liability on the mortgages is shared equally with the estate because the decedent secured these mortgages before his death. In effect, petitioner is asserting that the trial court erred in disallowing the entirety of these claims and that the estate should be responsible for all, or at least one-half of the liabilities associated with the mortgages on the properties existing at the time of the decedent's death.

"The title to personal property of decedent at his death passes to his executor or administrator upon appointment, and rests in them absolutely; but the title to real estate descends immediately to his heirs, subject to be divested for the payment of decedent's debts." *Michigan Trust Co v City of Grand Rapids*, 262 Mich 547, 550; 247 NW 744 (1933) (citations omitted). Our Supreme Court has opined:

For the reason the legal title to personal property, upon the death of the ancestor and the appointment of an executor or administrator, passes as of the date of the death of the ancestor, to the executor or administrator and the heir indebted to such estate owes him, he may apply what the heir owes him in payment of what he owes the heir. While as to real estate the title of which passes upon the death of the ancestor to the heir unless otherwise directed by will, no set-off is possible. [*Id.* at 552.]

In identifying the debts or liabilities of an estate, our Supreme Court has stated:

In a very common use, 'estate' signifies the entire condition in respect to property of an individual; as in speaking of a bankrupt, decedent, or insolvent estate, or of administering upon an estate. Here not only the property, but indebtedness, is a part of the idea. The estate does not consist of the assets only. If it did, such expressions as "insolvent estates" would be misnomers. [*In re McRae*, 179 Mich 595, 603; 146 NW 265 (1914) (citations omitted).]

This is consistent with prior rulings involving testamentary estates, indicating that a devisee of a will receiving land that is subject to a mortgage is not obligated to pay the outstanding balance unless required by the will. Rather the balance constitutes a charge against the estate. *Enders v Enders*, 49 Mich 182, 184; 13 NW 507 (1882). Historically:

[I]n regard to encumbered real estate, devised or descended, the rule at the common law was, that if the encumbrance was one created by the testator as for his personal debt, the personal estate was chargeable with the payment of the debt. If the encumbrance was created before the purchase by the testator, and he

had not himself become liable for the debt, then the encumbered property was the primary fund for the payment of the debt, and the heir or devisee must take it subject to the charge therefor. [*In re Wisner's Estate*, 20 Mich 442, 443 (1870).]

The treatment of a decedent's property and associated liabilities is summarized in 13 Michigan Pleading and Practice (2d ed), § 103:1, pp 447-448 as follows:

An heir, or any other person entitled to share in the assets of a decedent, can acquire no better right or title than the decedent had, and the assets are first subject, after payment of homestead and family allowances, to administration expenses and allowed claims. Subject to homestead and family allowances, or dower, right of exempt property and to all prior charges against the estate, the estate, both real and personal, is subject to the payment of the decedent's debts. Estate taxes are considered a charge against the gross estate in determining the net estate, the amount used to determine the residue and the amount of the surviving spouse's share.

Any testamentary disposition, like any right of inheritance, is subject to debts provable and allowed as claims, expenses of administration, and any state or federal taxes that may be imposed on the transfer of succession.

Most contractual obligations survive the death of the obligor and therefore remain obligations of the estate after the obligor's death. . . . Of course, an estate can no more be liable on a claim than could the decedent, if living. [Footnotes omitted.]

In the circumstances of this case, respondent does not actually dispute the estate's liability for the decedent's mortgage obligations. Rather, respondent argues that petitioner's misuse of estate funds and failure to obtain prior probate court approval for payment of the liabilities resulted in the transactions being voidable, premised on MCL 700.3713, which states in relevant part:

(1) A sale, encumbrance, or other transaction involving the investment or management of estate property in which the personal representative has a substantial beneficial interest or that is otherwise affected by a substantial conflict between the personal representative's fiduciary and personal interests is voidable by an interested person unless any of the following are true:

(a) The will or a contract entered into by the decedent expressly authorized the transaction.

(b) The transaction is approved by the court after notice to interested persons.

(c) The transaction involves a contract entered into or claim acquired by the personal representative before the person became or contemplated becoming personal representative.

(d) The transaction is otherwise permitted by statute.

The court erred in disallowing all of the mortgage expenses claimed by petitioner. It was undisputed that the decedent had incurred the mortgage liabilities on the properties well before his death. As such, the decedent's liability on the mortgage survived his death and became a liability of his estate. *In re Wisner's Estate*, 20 Mich at 442. Although petitioner was in error to charge the entirety of the mortgages and other expenses associated with the properties to the estate and in not properly reporting or accounting for the assets and associated liabilities, the probate court should not have disallowed the claims in their entirety when at least a portion of the debt was a permissible cost to the estate. As such, the issue requires remand to the probate court to discern and calculate the amounts legitimately attributable as a liability to the estate. Although respondent is correct that MCL 700.3713(1) provides authority to void transactions that constituted a breach of fiduciary duty, petitioner's use of estate assets to pay mortgage liabilities was voidable only to the extent that the assets were for her personal obligations and not the decedent's debts. By disallowing the entirety of the mortgage expenses and commensurately imposing a surcharge on monies that comprise legitimate estate expenses, petitioner is effectively being sanctioned twice for the same conduct resulting in overcompensation to the estate.

Next, petitioner asserts as error the probate court's award requiring her to reimburse the estate \$591,253, for her failure to liquidate the decedent's interest in two business entities, Metro Ventures, Inc. and Paradies Metro Ventures, Inc., as required by the shareholder agreements. The amount awarded represents the "loss in value of those interests" from the time of the decedent's death to the date of the probate court's judgment.

Some background pertaining to these investments is necessary to place events and the award into context. Metro Ventures, Inc. and Paradies Metro Ventures, Inc. (hereinafter "MV I" and "PMV I") were investments entered into by decedent. According to David Lewis, one of the original shareholders and officers of MV I, "The general purpose [of MV I] was to bid for and win the rights and run concessions at Metropolitan Airport." The actual airport concessions were not operated under MV I. Specifically, "Metro Ventures was a joint venture partner with Paradies shops for the contract awarding process for concessions at Metro." The contract obtained by MV I spanned from 1991 to 2001, for operation of concessions out of the Davey and Smith terminals. The decedent's ownership interest, at the time of death was 6.85 percent of MV I, representing 1,370 shares. At acquisition, the decedent paid \$1 a share for this investment. In addition, the decedent contributed \$5,000 "to provide working capital" in the early development stages. At the time of the decedent's death there had not been a valuation performed for this stock, which was not publicly traded. PMV I was incorporated in 1990. According to Lewis, a provision of the shareholder agreement for MV I, as signed by the decedent, provides:

[I]n the event of the death of one of the shareholders, the executor, personal representative or other legal representative of the deceased shareholder, shall offer to sell all of the deceased shareholder's shares to the purchasing shareholders in proportionate shares.

Petitioner, however, obtained waivers from the MV I shareholders, permitting the estate to retain the decedent's shares in these business entities following his death.

Metro Ventures III, L.L.C. (hereinafter “MV II”) was established on September 27, 2001, approximately one month before the decedent’s death. The funding for MV II did not occur until after the decedent’s death, and was obtained through distributions from PMV I. According to Lewis, MV II comprised another joint venture with the Paradies Shops for concessions at Detroit Metropolitan Airport’s McNamara terminal. The estate’s ownership interest in MV II was 14.28 percent, representing a capital contribution of \$142,800, derived from the redirection of distributions entitled to shareholders in PMV I, to purchase the shares in MV II. This redirection of PMV I assets to obtain an ownership interest in MV II was with the consent of petitioner, while personal representative of the estate. Petitioner asserted at trial that her failure to sell the shares of MV I was in accordance with the verbal directions she received from the decedent before his death.

On petitioner’s inventory, she indicated valuations of \$225,000 for MV I and \$300,000 for PMV I. During the testimony of Lewis, counsel for respondent indicated she would “waive any objection that we had to the valuation on the inventory as to the at-time-of-death value placed in the inventories.” Glen Olivache, a CPA, who performed accounting services for the business entities, provided testimony regarding the assets and liabilities of the businesses. Ana Yolanda McKune Van de Velle, formerly served as treasurer for and currently serves as president of MV I and MV II and is chairperson of the board of PMV I. She indicated the value of MV II, as of May 31, 2006, was \$13.28 a share. At trial, respondent admitted an accounting of distributions to the decedent and estate from the Metro Venture enterprises (I and II). The exhibit indicated distributions totaling \$213,275.41 to the estate for this period. Notably, however, \$77,185.60 of the distributions was received by the decedent before his death in late 2001, indicating receipt by the estate of only \$136,089.81 in distributions.

On the accountings prepared by respondent for the estate, following her appointment as second successor personal representative on March 9, 2006, respondent continued to report valuation of these assets consistent with that initially indicated by petitioner. In her fifth annual account, spanning April 1, 2010, to March 31, 2011, respondent reported the following as income: (a) Metro Ventures distributions of \$57,930 and (b) Sale of Metro Ventures shares for \$15,455. On this same accounting, respondent listed as part of the estate’s remaining itemized assets: (a) Metro Ventures, Inc. \$225,000 and (b) Paradise [sic] Metro Ventures and Metro Ventures II, L.L.C. \$300,000, contributing to a “total balance [of assets] on hand” of \$1,265,159.73.

In rendering its decision at the conclusion of trial, the court indicated some uncertainty regarding the value of these investments, stating: “[Respondent] negotiated with the shareholders to keep the shares as well as the shareholders of Paradies. Had [sic] shares been sold, the Court is wondering how much the Estate would have received if they were sold at that time.” In the March 9, 2011, judgment, the probate court ultimately stated that “Judith Young-Doss failed to liquidate the Decedent’s interest in Metro Ventures, Inc. and Paradies Metro Ventures, Inc., as required under the Shareholders Agreements for those entities, and she is therefore indebted to the Estate for the loss in value of those interests between the Decedent’s date of death and the date of this Judgment, in the total amount of \$591,253.”

A probate court is authorized to impose liability on a personal representative for the breach of his or her fiduciary duty. Specifically, “If the exercise or the failure to exercise a

power concerning the estate is improper, the *personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty* to the same extent as a trustee of an express trust.” MCL 700.3712 (emphasis added). In accordance with MCL 700.1308(1):

A violation by a fiduciary of a duty the fiduciary owes to an heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary is a breach of duty. To remedy a breach of duty that has occurred or may occur, the court may do any of the following:

- (a) Compel the fiduciary to perform the fiduciary’s duties.
- (b) Enjoin the fiduciary from committing a breach of duty.
- (c) Compel the fiduciary to redress a breach of duty by paying money, restoring property, or other means.
- (d) Order a fiduciary to account.
- (e) Appoint a special fiduciary to take possession of the estate’s, ward’s, protected individual’s, or trust property and administer the property.
- (f) Suspend the fiduciary.
- (g) Remove the fiduciary as provided in this act.
- (h) For a fiduciary otherwise entitled to compensation, reduce or deny compensation to the fiduciary.
- (i) Subject to other provisions of this act protecting persons dealing with a fiduciary, void an act of the fiduciary, impose a lien or a constructive trust on property, or trace property wrongfully disposed of and recover the property or its proceeds.

Liability is premised on the special status of a fiduciary, who “stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary.” MCL 700.1212(1). A breach of fiduciary duty permits the imposition of “[d]amages . . . when a position of influence has been acquired and abused, or when confidence has been reposed and betrayed.” *In re Baldwin Trust*, 274 Mich App 387, 401; 733 NW2d 419 (2007) (citation omitted).

A review of the probate court file and decision raises several concerns. The most obvious is the time frame used by the court to impose liability. Petitioner was the original personal representative when the estate arose in 2001, but respondent became the second successor personal representative in March of 2006, and continues to this date. Yet, the trial court found petitioner liable to the estate from the decedent’s date of death in October 2001 to “the date of this Judgment,” March 9, 2011, which encompasses almost five years of time when petitioner had no authority to act on behalf of the estate. It would appear, based on the testimony of McKune Van de Velle, that Metro Ventures, as of the end of May 2006, and during respondent’s

tenure, had at least a value of \$13.28 a share (recall that decedent paid \$1 a share for his investment in addition to a \$5,000 contribution toward “working capital.”). This is not accounted for, as the probate court’s order that petitioner pay the estate \$591,253 indicates that the probate court deems the stock to have absolutely no value. It also raises a question whether respondent shares some responsibility for any loss in value during the period of her tenure as personal representative.

This leads to a second concern involving the failure to credit or account for distributions received by the estate during this period.¹ Respondent acknowledges that the estate received distributions from Metro Ventures I and II from 2001 through 2004. Discounting the monies received by the decedent before his death, distributions acknowledged by respondent totaled \$136,089.81. Notably, respondent continued to identify distributions to the estate on her accountings. By way of example, respondent’s Second Annual Account spanning March 31, 2007, to March 31, 2008, included income to the estate of: (a) \$9,180.44 from Metro Ventures II distributions and (b) \$17,243.44 from Paradies Metro Ventures Distributions. In her Third Annual Account spanning April 1, 2008, to March 31, 2009, respondent acknowledged as income to the estate: (a) \$4,590.22 from Metro Venture II, LLC and (b) \$3,869.90 from Paradies Metro Ventures, Inc. Respondent’s Fourth Annual Account included \$29,481 as income from Metro Ventures III, LLC. In the Fifth Annual Account, designated as covering April 1, 2010, through March 31, 2011, respondent included in her listing of income to the estate: (a) Metro Ventures distributions of \$57,930 and (b) Sale of Metro Ventures shares \$15,455. Clearly, some value existed, which the probate court did not account for, or use for offset, in its ruling. Further, respondent never indicated a different value of the assets on her various accountings, consistently reporting valuations of \$225,000 for Metro Ventures, Inc. and \$300,000 for Paradies Metro Ventures, Inc. and Metro Ventures, III, LLC which respondent also still indicated that the estate owned as of the fifth accounting. It is disingenuous and inequitable to assert a complete loss in value of an asset while simultaneously acknowledging receipt of income generated from the asset and a consistent value on that same still-existing asset in estate accounts.

This leads to what we presume respondent will assert - that the original investments, MV I and PMV I, were worthless and that the court’s holding is reflective of that fact and should be differentiated from the subsequent or derivative ventures of MV II and PMV II. Because MV II and PMV II were retained and reported by the estate as assets, it seems inappropriate, particularly given their origin, to treat them as different or separate assets rather than an extension or continuation of the original investments or to fail to recognize if they resulted in any benefit to the estate. The estate would not have received distributions from MV II and PMV II if petitioner had simply liquidated MV I and PMV I immediately following decedent’s death. It also appears from the accountings that respondent, as personal representative, treated these

¹ We note that whether the estate actually received the distributions or the distributions were misappropriated in whole or in part by petitioner is a separate issue that is not specifically addressed by the parties and may, on remand, need to be addressed for accuracy in the determination of any liability, if not accounted for elsewhere. In addition, this does not account for distributions used to purchase stock for MV II.

subsequent entities as continuations or extensions of the original assets. If they resulted in any benefit to the estate, it should be recognized in terms of the imposition of liability to petitioner in calculating an offset for the loss in value attributable to the original investments. Further, when the estate is finalized and the assets are distributed, petitioner will receive her commensurate share (if any) from MV II and PMV II, making their manner of treatment potentially irrelevant based on mathematical calculations. However, it does become relevant for the figures used to calculate the surcharge imposed against petitioner.

We also note a final concern. In respondent's brief on appeal, she states:

In its Opinion delivered from the bench on January 10, 2011, the trial court stated that it would receive proof regarding the loss on Metro Ventures' entities and the surcharge for interest based upon its ruling on those claims.

Thereafter, Appellee's counsel submitted summary charts for both categories of damage on January 31, 2011, and copied Judith Doss' counsel. The Metro Ventures' damages were based on the difference between book value at or about the date of death and as of December 25, 2010, for Paradies – Metro Ventures, Inc., and as of December 31, 2009, for Metro Ventures, Inc. (Tab 3).

Respondent attaches to her appellate brief three typed "charts" comprising valuations and a cost/benefit analysis for these ventures. We are unable to verify or locate these documents in the lower court record and, thus, cannot rely on them because they comprise an improper expansion of the record. MCR 7.210(A)(1); MCR 7.212(C)(6), (D)(1). In addition, conspicuously absent in the documents is any calculation or reference to the possible value of these assets, as evidenced by testimony elicited at trial, during respondent's tenure as personal representative. Any value retained, in equity and good conscience, needs to be accounted for and included in the calculation of loss.

Petitioner also challenges the reasonableness of the attorney fees awarded, citing to the lack of a record to substantiate the probate court's determination that petitioner "is currently indebted to the Estate for attorney fees and out-of-pocket expenses incurred by the Estate in pursuing this litigation in the amount of \$558,825, based on hourly charges."

"Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal." *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Nonetheless, "this Court may overlook preservation requirements . . . if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). When a party raises issues pertaining to the reasonableness of an attorney fee award for the first time on appeal, it is not deemed preserved and this Court need not consider the issue, "unless our refusal would lead to manifest injustice." *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992).

The issue of attorney fees was implicit throughout trial as evidence was presented regarding the propriety of petitioner's request for payment of attorney fees for work performed as delineated in her accountings and respondent's commensurate request for attorney fees being

expended on behalf of the estate. The probate court disallowed, in its entirety, petitioner's request for attorney fees and awarded the estate \$558,825 in "attorney fees and out-of-pocket expenses." As such, the general issue of attorney fees is preserved. However, following the probate court's award of attorney fees to the estate, petitioner failed to object or challenge the ruling until this appeal, thus, failing to preserve any issue pertaining to the reasonableness of the amount awarded.

This Court reviews a trial court's interpretation and application of statutes and court rules de novo. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). A trial court's decision to award attorney fees is reviewed for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). This Court's "review [of unpreserved issues] is limited to determining whether a plain error occurred that affected substantial rights." *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007). Specifically:

To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. [*Id.* at 285-286 (citations and quotation marks omitted).]

A personal representative is authorized by statute to "[p]rosecute or defend a claim or proceeding . . . for the protection of the estate and of the personal representative in the performance of the personal representative's duties." MCL 700.3715(x). In addition, MCL 700.3715(w) allows a personal representative to "[e]mploy an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties. . . ." In accordance with MCL 700.3720, "If a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith, whether successful or not, the personal representative is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fees incurred." Attorneys are entitled to reasonable compensation for necessary legal and administrative services performed on behalf of an estate or a personal representative. MCR 5.313(A); MCL 700.3715(v).

Based on the lower court record and the probate court's findings, it cannot legitimately be disputed that the work performed by respondent's attorneys benefited the estate. Had actions not been taken, petitioner would have transferred substantial estate assets, such as the proceeds from United Communications, Mashpee Associates, the disputed units of Atwater, decedent's art work collection, and other monies or business interests and investments to her personal use and benefit. Petitioner's actions were found by the probate court to be "willful[], malicious[] and with the intent to defraud the other heirs of the Estate. . . ." Further, based on the dearth of materials contained in the probate court record and the sheer number of exhibits admitted at trial in this matter, there is a basis to assume that a substantial amount of work was performed by counsel in seeking to ascertain, reacquire and protect estate assets. The actions of petitioner unnecessarily prolonged the time required to probate this estate and directly resulted in the incurrence of substantial attorney fees. Consequently, circumstances existed to substantiate an order requiring respondent to reimburse petitioner's attorney fees to the estate. That is not to say, however, that substantiation existed for the amount awarded.

Although a probate court is authorized to exercise broad discretion in determining the amount that comprises a reasonable compensation, *In re Krueger Estate*, 176 Mich App 241, 248; 438 NW2d 898 (1989), that discretion is not completely unfettered. Specifically, MCR 5.313, which governs the award of reasonable compensation for legal services rendered on behalf of a personal representative, requires, “In determining the reasonableness of fees, the court must consider the factors listed in MRPC 1.5(a).” When evaluating a fee petition, the probate court must review the requested attorney fees for reasonableness with a commensurate focus on preserving the assets of the estate for the beneficiaries. *In re Sloan Estate*, 212 Mich App 357, 364; 538 NW2d 47 (1995). Specifically, legal services that are rendered on behalf of an estate are compensable if “the services confer a benefit to the estate by either increasing or preserving the estate’s assets.” *Id.* at 362. In addition, “where extraordinary fees and costs are incurred because of an opposing party’s fraud, unjustified objections raised in bad faith, or other extraordinary circumstances, the probate court is authorized to impose appropriate sanctions via various fee-shifting mechanisms.” *Id.* at 363 n 2, citing MCR 5.114; MCR 2.114(B)-(F).

There is a lack of sufficient materials in the lower court record for this Court to conduct a meaningful review of the attorney fees awarded. The lower court file discloses some billing statements by respondent’s attorney, but not a complete accounting. Respondent contends, in her brief on appeal, that her fee request was submitted to the probate court and petitioner’s counsel, and was “discussed.” According to respondent, the original retainer agreement with counsel was a “contingent fee agreement,” which was resubmitted at the direction of the probate judge “on an hourly charge basis.” None of this documentation, however, is in the lower court record. There is no accounting or transcript revealing the submissions or discussions. There is no record, other than the amount awarded as contained in the Order of Judgment, to evidence the hours or fees charged.

Further, it has been recognized that certain fees incurred or charged by attorneys are not properly compensable by the estate. For example, fees-for-fees claims, which involve claims for payment from an estate for attorney fees and costs charged in the process of establishing or defending a petition for payment of attorney fees, “clearly do not benefit the estate because they do not increase or preserve the estate’s assets.” *In re Sloan Estate*, 212 Mich App at 363. Rather, “the ordinary fees and costs incurred in establishing and defending a fee petition are inherent in the normal course of doing business as an attorney, and the estate may not be diminished to pay those fees and costs.” *Id.* If the probate court is awarding fees, it should clearly distinguish those that are compensable to the estate from those that comprise sanctions for improper conduct, if any.

While under the conditions that existed in this case, a significant attorney fee may be justified, it cannot be determined from the current record. Hence, the record, as submitted on appeal, is simply inadequate for this Court to conduct any meaningful review, necessitating remand.²

² The record was previously sent back to the trial court for organization due to its initially submitted state of chaos. Exhibits had been simply thrown in random order into boxes and

Petitioner next challenges the court's determination that she is required to reimburse the estate \$230,000 in "excess capital gains tax" incurred following the redemption of the estate's interest in Atwater. During the proceedings, the parties litigated not only the tax liabilities and responsibility following redemption of the Atwater investment, but also the ownership rights of seven shares in this entity.

For the first time on appeal, petitioner suggests that she is eligible for an offset premised on her payment of increased personal capital gains taxes following distribution of the asset by the estate. "Issues raised for the first time on appeal are not properly preserved and, thus '[n]ot subject to review' save for 'exceptional circumstances.' On the record here before us we do not discern any 'extraordinary circumstances' requiring us to abandon this cardinal rule." *Lantz v Southfield City Clerk*, 245 Mich App 621, 627 n 4; 628 NW2d 583 (2001).

"We review a probate court's factual findings under the clearly erroneous standard." *In re Townsend Conservatorship*, 293 Mich App at 186. "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.* (quotation marks and citation omitted). "We review de novo issues of statutory interpretation." *Id.* This Court reviews a probate court's dispositional rulings for an abuse of discretion. *In re Baldwin Trust*, 274 Mich App at 396-397. A probate court is found to have abused its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Id.* at 397. This Court's "review [of unpreserved issues] is limited to determining whether a plain error occurred that affected substantial rights." *In re Smith Trust*, 274 Mich App at 285.

Atwater comprised an investment by the decedent in what became Motor City Casino. The agreed value at the time of redemption of the investment was \$2.8 million for the decedent's seven shares. It is undisputed that petitioner used a cost basis analysis for tax purposes regarding this asset. Petitioner asserted that she paid \$280,000 to the Internal Revenue Service (IRS) for the anticipated capital gains tax liability even though she did not actually report or include the redemption on the estate's tax returns to the IRS believing that the liability would not be due until actually disbursed to the beneficiaries. As a consequence, the IRS indicated an overpayment or credit of approximately \$197,000 for the estate. Using a cost basis analysis, petitioner indicated the value of the interest in Atwater as being \$383,842 premised on the amount originally paid, reflecting a gain of \$2,416,158 on redemption. It should be noted that \$383,842 reflects the value of five shares of Atwater listed on petitioner's first inventory submitted as successor personal representative of the estate when she was disputing whether the Atwater shares were the property of the estate or her personal property. The original value of the seven Atwater shares was reported by petitioner as \$530,842, less a lien of \$147,000. When petitioner did file forms with the IRS, the court noted that she "listed Atwater as an estate asset with a value of \$530,842." We assume that the calculation of additional capital gains taxes incurred is premised on the \$530,842 figure.

documents were often incomplete and appeared to be filed, at times, in no logical order. While the resubmitted record is an improvement, it still reflects an unacceptable state of record-keeping.

In an effort to legitimize her treatment of the Atwater redemption funds, petitioner presented the testimony of Evelyn Anderson, the person she retained to prepare her personal and estate tax returns while personal representative. Notably, Anderson is not a certified public accountant (CPA), and the court indicated, based on the “opportunity to witness the Accountant testify” that it “was not impressed with her.” Specifically, the court found “[h]er knowledge of Federal regulations was lacking to the end result that the Accountant [sic] had to be completely reviewed and corrected.” Anderson opined that it was better or more beneficial to those involved, including the estate, to disburse the funds from Atwater to the individual beneficiaries to pay capital gains on their personal taxes. Anderson acknowledged that no appraisals of Atwater, or other businesses, were sought to determine their date-of-death values. Petitioner also presented the testimony of Benjamin Brown, a CPA that provided advice to Anderson. Brown asserted that a cost basis analysis could be used in the absence of an appraisal to determine the value of the shares of a closely held company. When queried regarding the responsibility for the capital gains tax liability, Brown acknowledged that if the money was received by the estate and not disbursed to the beneficiaries, the estate would be responsible for payment of the taxes.

In contrast, respondent presented the testimony of Lorraine New. New is currently an attorney who does consultation work for attorneys “who have problems with the IRS.” Previously, New worked for the IRS and, for a period of time in the prior five years “was the manager of the Estate and Gift Tax Division in the State of Michigan” for the IRS. New performed an audit of the tax returns submitted on behalf of the estate by petitioner and opined that the proper method of valuation for closely held stock, such as that of Atwater “should be the fair market value of any of the assets that appear on the Estate tax returns.” The following exchange occurred between New and respondent’s counsel:

Q. If the cost basis was reported on the Estate tax return rather than the date of death value, what would be the effect of that for the Estate?

A. Well there is a provision under the Estate tax code for a step up in basis, upon death. Which means, that when you report the correct value on the 706, your basis then becomes that amount, instead of what you actually had originally paid for it. So, when an asset then goes up in value you have a better basis and you don’t have to report as much capital gain when that asset is sold.

Q. So by reporting the cost basis, rather than the fair market value, the Estate, upon the redemption of those shares would have additional capital gains to the extent that the redemption exceeded the basis?

A. Yes.

New also indicated, by the time of trial, that the permissible period had lapsed for any correction of the decedent’s original estate tax return to reflect the proper figures. Comparing the tax liabilities incurred using the cost basis analysis and a fair market value appraisal, New determined that the additional capital gains tax owed by the estate was \$230,421.00, and that this amount was attributable to the incorrect method of valuation used by petitioner. On August 9, 2010, although not specifying an amount, petitioner and respondent entered into a stipulated order, which acknowledged:

Judith Young-Doss, as Personal Representative, used cost-basis, rather than fair market value, for the Estate's interest in Atwater Entertainment Associates, LLC, when she valued that asset for Federal Estate Tax purposes, resulting in additional capital gains tax liability to the Estate, when the asset was liquidated.

Respondent also, implicitly, challenged petitioner's contentions and reasoning through the testimony of Stuart Sakwa, who was hired by respondent as a CPA to review various tax returns. Sakwa amended the estate's 2005 federal tax return "because there was a redemption of a partnership interest that had not been recorded" with regard to Atwater. In reviewing petitioner's personal tax return for that year, Sakwa noted that petitioner also failed to report the redemption of her two personal shares of Atwater.

The issue on appeal is, in actuality, twofold. First, petitioner implies the propriety of assessing the additional capital gains tax against her premised on a mistaken valuation and, second, petitioner suggests that the issue is not ripe because the amount cannot be substantiated as the IRS has not yet determined any such liability against the estate nor has the estate paid this amount in capital gains tax. Petitioner also asserts she should receive an offset of \$173,000, reflecting a benefit incurred by the estate from the miscalculation, which somehow reduced the estate's obligation and caused petitioner to have a greater personal tax liability.

Addressing first the propriety of the probate court's imposition of the estate's additional capital gains liability to petitioner, it is noted that the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, provides for the imposition of personal liability on a personal representative who is determined to have violated their fiduciary duty in administering an estate. A personal representative is recognized as a fiduciary by MCL 700.3703(1) and required to "observe the standard of care applicable to a trustee. . . ." Accordingly, "A personal representative is under a duty to settle and distribute the decedent's estate in accordance with the terms of a probated and effective will and this act, and as expeditiously and efficiently as is consistent with the best interests of the estate." *Id.* When the requisite standard of care is not demonstrated by a fiduciary, MCL 700.1308(1)(c) provides:

A violation by a fiduciary of a duty the fiduciary owes to an heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary is a breach of duty. To remedy a breach of duty that has occurred or may occur, the court may . . . [c]ompel the fiduciary to redress a breach of duty by paying money, restoring property, or other means.

Consequently,

If the exercise or failure to exercise a power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty to the same extent as a trustee of an express trust. [MCL 700.3712.]

In this instance, the probate court made repetitive findings regarding petitioner's lack of honesty in dealing with the estate and heirs involving the consistent misuse of estate funds and self dealing. The court determined that petitioner "acted willfully, maliciously and with the

intent to defraud the other heirs of the Estate” The probate court rejected petitioner’s assertion that her errors were the result of bad advice received from counsel. In support of its finding, the court observed:

During the trial, it became easily apparent that [petitioner] was a person of little credibility. She was articulate and knowledgeable, but when confronted with her actions, she cannot justify her misconduct as a fiduciary. In almost every brief, she and she alone was the person who benefited.

For purposes of example, we note the court specifically identified petitioner’s questionable conduct to include (a) the failure to include the New York co-op apartment, which was later sold for \$295,000, in the estate inventories, (b) the failure to provide annual accounts to the other estate heirs, (c) the notification to the heirs that the estate was insolvent followed closely by the reopening of the estate to allow petitioner to transfer title to assets, (d) the expenditure of estate assets for petitioner’s personal use and expenses, including the wire transfer of \$695,000 from the redemption of Atwater into a personal account in Barbados; (e) respondent’s admitted misappropriation of \$62,000 from the estate for her gambling expenses; along with (f) the transfer of estate assets such as shares in Mashpee Associates to petitioner rather than to the estate. As such, the probate court properly imposed on respondent liability for the excess capital gains taxes to be incurred premised on her negligence and breach in the performance of her fiduciary duties while acting as personal representative of the estate.

Petitioner next contends that the amount awarded of \$230,000 is speculative because the IRS has not yet required or verified the amount of excess capital gains taxes to be paid on the Atwater redemption. Based on petitioner’s own stipulation, it has been acknowledged that monies will be due to the IRS because of the liquidation of the Atwater asset and use of the improper method of valuation. As noted by petitioner, the only evidence of the amount to be due was provided through the testimony of New, who estimated the additional capital gains tax to be \$233,420. Respondent correctly observes that petitioner did not refute this amount in the lower court. Questions exist regarding New’s calculation of the fair market value of the Atwater asset for determination of the additional capital gains. At trial, New referenced a document she prepared, which was “a comparison of the fair market value versus the tax basis that was used on the return, or the partnership interest.” This document is not contained within the exhibits provided with the lower court file and, thus, we are unable to ascertain the method, accuracy or amount determined by New to comprise the fair market value of the asset, given that it is not publicly traded. However, evidence was presented through the testimony of Kadean Carpenter-Barfield, the president of Atwater, indicating the value of the asset units within close proximity of the decedent’s date of death. On December 20, 2001, approximately two months after decedent’s death, Carpenter-Barfield provided a letter to the Michigan Gaming Control Board informing the Board of cash distributions for three estates “holding direct investments in Atwater.” Carpenter-Barfield indicated that “[t]he estimated current value of the [Atwater] units still remaining in the Estate of Lawrence Doss, based on last approved sales price, is \$1,750,000.” Using this figure as the fair market value would suggest an error of \$1,696,158 in the reporting of the value of this asset to the IRS, to the detriment of the estate. In other words, based on the fair market value of the asset, the estate would have been responsible for capital gains on \$1,050,000 rather than the \$2,746,151 in gains calculated when using petitioner’s cost basis figure of \$530,842. Based on the existence of evidence that was not contradicted by

petitioner regarding the fair market value of the stock and additional capital gains incurred through petitioner's error in using a cost basis analysis for reporting of gains to the IRS, the court's imposition of liability in the amount of \$230,000 is substantiated by the record and within the court's authority.

Petitioner also asserts that she should be entitled to a credit of \$173,000, premised on her assertion that she personally paid a significant portion of the capital gains taxes, which somehow resulted in the estate incurring a lessened obligation. In support of her contention, petitioner relies on an exhibit appended to her appellate brief, which she acknowledges was not admitted at trial and, therefore, is not a part of the lower court record. This document cannot be considered as it is an improper expansion of the lower court record. MCR 7.210(A)(1); MCR 7.212(C)(6), (D)(1). "This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Because petitioner does not come forward with any evidence of her assertion, which is raised for the first time on appeal, we decline to entertain her assertion of error.

Finally, petitioner contends the probate court erred in calculating a surcharge of \$887,686 against her. Petitioner does not challenge the propriety of a surcharge. Rather, she contends the record is insufficient to substantiate the court's calculation.

The decision of a probate court to surcharge a fiduciary is reviewed for an abuse of discretion. *In re Baldwin Trust*, 274 Mich App at 397. Issues of statutory interpretation comprise questions of law, which this Court reviews de novo. *In re Baldwin Trust*, 274 Mich App at 396 (citation omitted).

"A fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary." MCL 700.1212(1). MCL 700.3712 provides: "If the exercise or the failure to exercise a power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty to the same extent as a trustee of an express trust." Similarly, MCL 700.1308(1) states, in relevant part: "A violation by a fiduciary of a duty the fiduciary owes to an heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary is a breach of duty." "Damages may be obtained for a breach of fiduciary duty when a position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *In re Baldwin Trust*, 274 Mich App at 401, citing *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 47; 698 NW2d 900 (2005) (internal quotation marks omitted). Thus, a personal representative may be held liable to interested persons for an improper exercise of his or her powers, or an improper failure to exercise powers, if there is a breach of fiduciary duty. MCL 700.3712.

"The purpose of a surcharge is to compensate distributees for loss caused by the want of due care, and for money or other property coming into the personal representative's hands for which he or she fails to account." 31 Am Jur 2d, *Executors and Administrators*, § 847. "[A]n administrator should not be surcharged for loss he or she has already paid from his or her own funds." *Id.* Thus,

A personal representative who is also a beneficiary and who pursues a course of conduct in conflict with the interests of his or her fellow distributees should be surcharged for the amount of: (1) any resulting loss or depreciation in the value of the estate; (2) any profit resulting to him or her; or (3) any profit that would have accrued to the estate had there been no breach of trust. [31 Am Jur 2d, Executors and Administrators, § 850 (citations omitted).]

This Court is unable to discern, due to the absence of any documentation in the lower court record, the figures or calculations used by the probate court in imposing a surcharge of \$887,686 against petitioner. Respondent alleges in her appellee brief that the document she attaches shows the charges and calculations used by the trial court, but we are unable to locate this document in the lower court record and have no means to verify its content or use by the trial court. Other than indicating the surcharge of \$887,686 and citing to an attachment that is not provided, the probate court's only reference to a surcharge is its statement: "The Court will ask the Attorneys to calculate the surcharge and submit it to the Court within twenty-one days. And, if you need more time, you let me know. I think you are both working together really good."

Based on the paucity of documentation within the lower court record, this Court cannot undertake a meaningful review of this issue, thus necessitating remand to the probate court for further explication and clarification. In addition, based on our findings on other issues regarding the probate court's errors in determining losses to the estate, any surcharge imposed will require recalculation based on an altered award or judgment.

We affirm in part and reverse and remand in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto